

II. LEGAL STANDARDS

After a jury trial, a district court may, upon motion, grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court” Fed. R. Civ. P. 59(a)(1)–(a)(1)(A). Erroneous jury instructions are grounds for a new trial unless the error is harmless. *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

III. ANALYSIS

A. First Motion for New Trial

Plaintiff argues that the Court improperly instructed the jury as to the assumption of the risk doctrine, and that the error was not harmless. The Court rejects this argument. Plaintiff argues that the Court instructed the jury on the assumption of the risk doctrine as follows:

Defendant seeks to establish that Plaintiff assumed the risk of any injury he claims to have sustained in the incident:

In order to establish that Plaintiff assumed the risk, Defendant must prove, by a preponderance of the evidence, the following elements:

1. That Plaintiff has actual knowledge of the risk
2. That Plaintiff voluntarily exposed himself to the danger.

If you find that each of these elements has been proved, ***then Plaintiff may not recover for his injuries and your verdict should be for the Defendant.*** If, on the other hand, you decide that any of these elements has not been proved, then the Defendant has not proved that Plaintiff assumed the risk.

(Mot. New Trial 3:10–18, Mar. 27, 2014, ECF No. 85 (emphases added)). But this is a misrepresentation. The Court in fact instructed the jury as follows:

ASSUMPTION OF RISK

Defendant seeks to establish that Plaintiff assumed the risk of any injury he claims to have sustained in the incident.

In order to establish that Plaintiff assumed the risk, Defendant must prove, by a preponderance of the evidence, the following elements:

- 1 1. That Plaintiff has actual knowledge of the risk
- 2 2. That Plaintiff voluntarily exposed himself to the danger.

3 If you find that each of these elements has been proved, *then you may use*
4 *Plaintiff's assumption of risk in determining whether Plaintiff was negligent.*

5 (Jury Instr. No. 23, ECF No. 72 (emphasis added)). This is apparent both from the record and
6 from the copy of the jury instructions Plaintiff himself attaches to his motion as Exhibit 1.

7 The Court's instruction was in accordance with Nevada law, under which the open and
8 obvious nature of a hazard is no per se bar to recovery but is simply relevant to the issue of
9 negligence. The model jury instructions published by the State Bar of Nevada suggests the
10 following instruction: "The owner or occupier of property is not liable to one injured on the
11 property where the injury resulted from a danger which was obvious or should have been
12 observed in the exercise of reasonable care." Nev. J.I. 8PML.3 (2011) (citing *Gunlock v. New*
13 *Frontier Hotel Corp.*, 370 P.2d 682 (Nev. 1962)). But the model instructions failed to note that
14 even as of their publication in 2011 the open and obvious danger doctrine in Nevada applied only
15 to the duty to warn, not to the duty to make safe generally. *See Harrington v. Syufy Enters.*, 931
16 P.2d 1378, 1381 (Nev. 1997). Moreover, since the publication of the model instructions, the
17 Nevada Supreme Court has abolished any remnant of a per se bar to recovery under an
18 assumption of the risk doctrine. *Foster v. Costco Wholesale Corp.* 291 P.3d 150, 152 (Nev.
19 2012) ("[W]e hold that the open and obvious nature of a dangerous condition does not
20 automatically relieve a landowner from the general duty of reasonable care. The fact that a
21 dangerous condition may be open and obvious bears on the assessment of whether reasonable
22 care was exercised by the landowner.").

23 In landowner liability cases, the "assumption of the risk" doctrine is referred to as the
24 "open and obvious danger" doctrine. The *Gunlock* line of cases is therefore more appropriate to

1 apply in the present case than the general purpose assumption-of-the-risk cases Plaintiff cites in
2 his motion. But the result would be the same even if analyzed under that line of cases.

3 As Plaintiff notes, in Nevada, there are three kinds of assumption of the risk: (1) express
4 assumption of the risk, which applies where there has been an express contractual release of a
5 defendant's duty to a plaintiff, *Mizushima v. Sunset Ranch, Inc.*, 737 P.2d 1158, 1159 (Nev.
6 1987); (2) primary implied assumption of the risk, where a plaintiff impliedly assumes the risks
7 inherent in a given activity such that an understanding that the defendant has no duty is imputed
8 to the plaintiff, *Turner v. Mandalay Sports Entm't*, 180 P.3d 1172, 1177 (Nev. 2008); and (3)
9 secondary implied assumption of the risk, where a plaintiff voluntarily encounters a known risk
10 created by a defendant's negligence, *Mizushima*, 737 P.2d at 1160. Plaintiff correctly notes that
11 evidence of express assumption of the risk is not at issue here. Plaintiff then notes that the issue
12 of whether primary assumption of the risk applies in a given case is a question of duty for the
13 court, not a question of negligence for the jury. *See Turner*, 180 P.3d at 1177 ("Whether [the
14 primary-assumption-of-the-risk] doctrine bars a plaintiff's claim should be incorporated into the
15 district court's initial duty analysis, and therefore it should not be treated as an affirmative
16 defense to be decided by a jury."). Plaintiff argues that the Court therefore erred when it
17 instructed the jury on the issue, and that the verdict in favor of Defendant could be attributable to
18 the error.

19 Plaintiff offers alternative arguments as to how the Court's instruction led to error.
20 Plaintiff argues that instructing the jury as to primary implied assumption of the risk would have
21 been error, because that issue is for the court. Plaintiff then argues that primary assumption of
22 the risk does not apply to cases like the present one, because there is no good argument that a
23 customer's entrance onto a retail premises implies that the customer agrees the landowner owes
24

1 him no duty of care, so the instruction must have been directed to the secondary assumption of
2 the risk doctrine. The Court agrees so far. Plaintiff then argues that the Court's instruction,
3 insofar as it was meant to be a secondary-implied-assumption-of-the-risk instruction, was in
4 error because it in fact amounted to a primary-implied-assumption-of-the-risk instruction. Here,
5 the Court disagrees.

6 The instruction was intended to convey the open and obvious danger doctrine, as recently
7 modified in *Foster*, which is the proper standard to be applied in landowner liability cases, and
8 which is essentially the same as the general purpose secondary implied assumption of the risk
9 doctrine in that the jury is to consider a plaintiff's actions as simply relevant to the negligence
10 issue. *Compare Foster*, 291 P.3d at 156 (citing Restatement (Third) of Torts: Phys. & Emot.
11 Harm § 51 cmt. k (2012)); *with Mizushima*, 737 P.2d at 1160 ("The third variety of implied
12 assumption of risk involves an unreasonable encountering of a known risk, amounting to
13 contributory negligence on the part of the plaintiff. This type of situation would exist where a
14 plaintiff takes an unnecessary and inexpedient shortcut to his destination, confronting known and
15 hazardous obstacles along the course of the abbreviated route.").¹ The Court's instruction in this
16 case is not directed to "duty," but "negligence," and it does not state or imply any per se rule, but
17 rather notes that the issue is simply relevant to negligence. The only "error" in the instruction is
18 that it refers to "assumption of the risk" as opposed to "open and obvious dangers." But those
19 phrases have no meaning to a jury as terms of art. They mean to a jury only what a court tells
20 the jury they mean, and the jury could not have accidentally imported the concept of a per se bar
21 to liability or lack of duty that might have been triggered in the mind of a personal injury
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23 1 The *Turner* Court overruled *Mizushima* only as to primary implied assumption of the risk,
24 which is now construed to concern duty, not negligence, and which must now therefore be
determined by the trial judge as a matter of law in Nevada.

1 attorney reading the instruction based upon the “assumption of the risk” language. The Court’s
2 instruction as to the meaning of “assumption of the risk” here comported with the applicable
3 open and obvious danger doctrine applicable in landowner liability cases like the present one. If
4 anything, the instruction was too strong in favor of Plaintiff, as it required Defendant to prove
5 two elements before the jury could even consider the open and obvious danger issue as relevant
6 to negligence.

7 Plaintiff next argues that there was no evidence adduced that could have supported the
8 instruction as to the issue of secondary implied assumption of the risk. But that is flatly untrue.
9 There was conflicting testimony concerning whether a cone was present where Plaintiff entered
10 the aisle, where exactly it had been positioned, and whether it had been moved after the incident,
11 but Jesus Flores—who testified through an interpreter—noted on cross-examination that there
12 were caution cones in the center of the aisle at each end of the aisle where Plaintiff fell, both
13 before and after he fell, and that they indicated “Caution - Wet Floor” and depicted a person
14 slipping and falling. (*See* Trial Tr. 38–52, Feb. 19, 2014, ECF No. 80). Plaintiff highlights
15 Flores’s testimony that he didn’t place any cones, but that is consistent with his testimony that
16 the cones were already in place when he arrived at the aisle (having presumably been placed by a
17 co-worker). Plaintiff also points out that Rosalind Citizen testified that a manager had moved a
18 cone after the incident from the side of the aisle to the center of the aisle, closer to Plaintiff as he
19 lay on the floor. (*See* Trial Tr. 11–18, Feb. 19, 2014, ECF No. 79). But that testimony, even if
20 believed—the jury was entitled to believe some testimony and disbelieve other testimony—tends
21 to confirm that a cone was placed at the end of the aisle where Plaintiff entered it, just not in the
22 center of the aisle, and the jury could have found that a cone on the side of the aisle, plus a cone
23 in the center of the aisle at the other end of the aisle, plus an employee scrubbing the floor nearby
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1 put Plaintiff on notice of the hazard. There was easily sufficient testimony relevant to the open-
2 and-obvious-danger/secondary-implied-assumption-of-the-risk doctrine to justify the disputed
3 instruction.

4 **B. Second Motion for New Trial**

5 Plaintiff has filed a second motion based on newly obtained transcripts. Plaintiff first
6 argues based upon dialogue between the Court and the parties outside the presence of the jury.
7 But the Court's and parties' comments in arguing the jury instructions are irrelevant to whether
8 the jury instructions were themselves in error. Second, Plaintiff argues that Defendant's closing
9 argument improperly referred to the assumption of the risk instruction because there was no
10 evidence adduced at trial that Plaintiff assumed the risk. But, as noted, *supra*, that is not the
11 case.

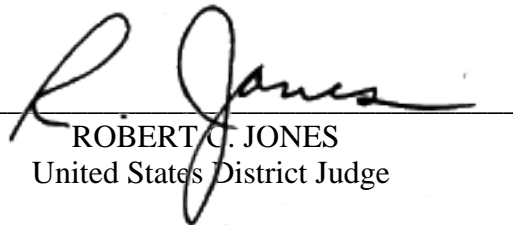
12 **CONCLUSION**

13 IT IS HEREBY ORDERED that the Motions for New Trial (ECF Nos. 86) are DENIED.

14 IT IS FURTHER ORDERED that the Clerk shall enter the Proposed Judgment (ECF No.
15 84) and close the case.

16 IT IS SO ORDERED.

17 Dated this 17th day of April, 2014.

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20 ROBERT C. JONES
21 United States District Judge
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